LANDLORD AND TENANT—OPTIONS TO RENEW—RECORDATION. —Sections 5192 and 5194 of the Code of 1919 provide in substance that any contract in writing made for the conveyance or sale of real estate, or a term therein for more than five years, shall be void as to subsequent purchasers for value and without notice, except and until admitted to record.

An interesting set of facts has recently arisen in this state, which necessitates the construction of the above statutes. The owner of certain property made a present demise thereof for a period of two years and one month, and by the same contract gave the lessee the privilege of four successive renewals of one year each at his option, under the same terms and conditions as set forth in the lease. This lease was in writing and sealed, but unrecorded, and contained the usual warranties of quiet enjoyment. During the second year after the commencement of the lease, the lessor sold and conveyed the property to a third person, providing in such contract for a division of the rents and the payment of taxes for the remainder of the period of two years and one month. The deed contained the usual warranties that the grantor had done nothing to incumber the premises and the jury found that the grantee did not have such cause for suspicion as to necessitate any further inquiry on his part which might have led to a discovery of the option in the contract aforesaid. Under these facts, the Court held that the transaction was not a *lease* for more than five years, but a *contract for a term* of more than five years in real estate and therefore void as to subsequent purchasers for value and without notice, except and until admitted to record.[1]

The contract in the instant case has as its object the creation of a present demise and an option; a present legal estate for a term of two years and one month, and an equitable claim to the same property for four periods of one year each, immediately following the expiration of the present legal estate. Upon the point as to whether a present demise and a contract to lease are to be taken together as a contract for a term in excess of the statutory period, when neither the present demise nor the option is of itself in excess of the period provided against by the statute, but the aggregate of the two does exceed such period as is allowed each by the statute, there is little authority.

By reference to the above mentioned sections of the Code, it will be seen that the lessee is not prohibited from holding under a contract creating a present legal estate for a period not exceeding five years, even against a subsequent purchaser for value and without notice, and even though such instrument is not admitted to record. It is admitted that the contract in the instant case does create a present legal estate for two years and one month, and it is not contended that such estate is for any greater term. Therefore the statute is not violated as respects this provision. The first result

[1] Great Atlantic and Pacific Tea Co. *v.* Cofer (Va.), 106 S. E. 695 (1921).

or object of the contract is good even as against the subsequent purchaser.

It now remains for us to deal with the option, or second part of the contract in the instant case. To avoid confusion, let us suppose for the present that the option is for four years instead of for four successive periods of one year each. There are two parts to an option: *first,* the continuing offer to lease, which does not become a binding contract until accepted; and *secondly,* the completed contract to leave the offer open for a stipulated time.[2] The option is the result or privilege created by the contract rather than the contract itself.[3] In the instant case the result is the privilege to renew for four years. This is in the nature of a unilateral contract to lease for such a term, the contract becoming binding upon the lessee only at his acceptance. At most, up to the time that the lessee chooses to exercise his power of election, he has only an equitable interest in the premises for such period. Since the statute provides only against such contracts to lease in excess of five years except and until recorded, and there is left in the contract in the instant case only an option to renew for a term of four years, it appears that the statute is not violated by this contract to lease.

Now the present demise in the instant case, standing alone, does not violate the statute; nor does the contract to lease, standing alone, violate any provision of the statute. The fact that the present demise precedes it in no way alters the nature or character of the option or contract to lease. As said by the Court in the instant case, "A contract for a lease and an actual present demise are essentially different". One creates a present legal estate and the other gives nothing more than an equitable interest. Nor does the present demise lose its character by being followed by a contract to lease. The statute expressly provides against either kind of claim being enforced against a subsequent purchaser for value and without notice unless admitted to record, if either such estate exceeds five years, but there is no express stipulation to the effect that when the two different kinds of claims appear in the same contract, such instrument must be recorded to be enforceable against such purchasers, if the aggregate of the two claims exceeds a period of five years.

It cannot be said that either the legal estate, or the equitable interest in the premises, lose their identity by being united in the same contract with each other. Are they, despite the fact that they retain their identity in such contract, deprived of the period of less than five years during which recordation is unnecessary? Should the statute, being remedial in its nature, be so construed as to bring about such a result?

We think that a consideration of the recognized method of interpretation of the Statute of Frauds furnishes a true guide to the

[2] Hanly *v.* Watterson, 39 W. Va. 214, 19 S. E. 536 (1894).
[3] Benedict *v.* Pincus, 191 N. Y. 377, 84 N. E. 284 (1908).

answer of this question, since the Statute of Frauds and the statute under discussion are both remedial and seek the accomplishment of the same general purpose.

The Statute of Frauds is universally held inapplicable to contracts which may by any possibility, no matter how remote, be performed within a year. An overwhelming probability of performance within a year is not enough. Absolute certainty past a shadow of doubt is required. Else the contract will be held to be without the Statute.

If the statute under discussion be interpreted in a like spirit, the contract involved must be held without its operation. It may be questioned whether there is a strong probability that the application of the statute to such contracts was contemplated by the legislature. Certainly there is a possibility that such application was not within the legislative intent.

F. P. C.